

COMMISSION DECISION
of 14 December 1984
relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.809 — John Deere)

(Only the Danish, Dutch and English texts are authentic)

(85/79/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Articles 2, 3 (1) and 15 (2) thereof,

Having regard to the complaint of 3 September 1982 filed with the Commission pursuant to Article 3 of the said Council Regulation by the National Farmers Union,

Having regard to the application of 12 November 1982 filed with the Commission pursuant to Article 2 of the said Council Regulation, concerning Article 13 of the General Conditions of Sale by John Deere Vertrieb Deutschland to its local dealers,

Having regard to the Commission Decision of 8 August 1983 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) and (2) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 ⁽²⁾,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

The parties

- (1) Deere and Company is incorporated under the law of the State of Delaware in the United States of America. Its registered office is at John Deere Road, Moline, Illinois, 61265 (USA). It has its European Office at Steubenstraße 36, Postfach 503, D-6800 Mannheim. It sells and distributes in some Member States of the Community through a number of branches or wholly owned subsidiary companies which appoint independent local dealers; in other Member States it appoints independent national dealers which, in their turn, themselves appoint independent local dealers.
- (2) Within the common market, Deere and Company trades under the following names:
 - (1) John Deere Export — the division (located in Moline) which manages its relations with independent national dealers;
 - (2) John Deere Vertrieb Deutschland — the German branch which deals with local dealers in Germany;
 - (3) John Deere Italiana — the similar Italian branch;
 - (4) John Deere SA — the subsidiary in France — which deals with local dealers in France;
 - (5) John Deere Ltd — the similar UK subsidiary.

John Deere Export reports to a Deere and Company Vice-President Export located in Moline and the other branches and subsidiaries report to a Vice-President Europe, Africa, Middle East located in Mannheim (both also responsible as their titles imply for operations outside the Community). These

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

two report to a Senior Vice-President and Managing Director — Overseas Operations, who is on Deere and Company's main board and located in Moline. In what follows the Deere group is referred to as Deere.

(3) The independent national dealers within the EEC involved in this case are:

(1) NV Cofabel,
Peperstraat 4A,
3071 Erps-Kwerps, Belgium;

(2) NV Louis Nagel & Co.,
PO box 76,
6500 AB Nijmegen, Netherlands;

and

(3) Dansk Oversøisk Motor Industri A/S (DOMI),
Sdr, Ringvej 35,
2600 Glostrup, Denmark.

There was also a national distributor in Greece — D. Avrassoglou SA — but it is understood that it has ceased trading.

The product and market

(4) The product involved is agricultural machinery. There is a wide variety of agricultural machinery, some manufactured by specialists. Some manufacturers, Deere among them, produce a wide range. In addition, some motor vehicle manufacturers, who otherwise have no interest in the sector, produce agricultural tractors. The product involved in this case is all the farm equipment including agricultural tractors sold by Deere.

(5) The markets principally concerned are those in which farmers or contractors buy agricultural machinery, usually from dealers at a retail level, in which retail dealers buy from manufacturers or from distributors at a wholesale level and in which distributors at a wholesale level buy from manufacturers or other distributors. The way in which Deere markets its products, described in paragraph 1 above, is typical.

The position of the parties

(6) Deere is a major manufacturer of agricultural machinery — for example it is the world's fourth largest tractor manufacturer, and second largest manufacturer of fodder machinery. It also manufactures industrial equipment. In 1983 its total turnover was \$ US 3 908 million, of which 3 314 were of farm equipment. Its turnover of agricultural machinery in the Community was ... ECU. Its market share varied from Member State to Member State, and for different types of farm equipment — for example, in 1983 it had ... % of the EEC market for combine harvesters (varying from ... % in Italy to ... % in Greece) and ... % for tractors (... % Italy — ... % Netherlands — all these figures are approximate, and there are differences in the statistical bases from State to State).

(7) Cofabel had a turnover of Bfrs ... in 1981, almost all consisting of farm equipment. Nagel's turnover, similarly, was Fl ... and DOMI's Dkr ... of which ... was of Deere equipment.

The proceedings

(8) On 3 September 1982, the National Farmers Union of the United Kingdom made a complaint concerning the alleged refusal of Cofabel to supply a tractor to a member. The member complained that Cofabel refused to supply him, even though he offered to pay in Belgian francs and take delivery in Belgium, because 'the John Deere factory in Germany forbids such' (original English).

(9) On 14 October 1982, inspectors in the Commission's service visited Cofabel's office in Erps-Kwerps, and on 18 and 19 November, Deere and Company's European Office. They took copies of about 150 documents relating to 'over the border sales'.

(10) On 12 November 1982, Deere, in the name of John Deere Vertrieb Deutschland, applied for negative clearance for the Article 13 of the general conditions of sale to be used from the

first day of that month as an annex to its local dealer's contracts within Germany. This Article read (original German):

- The article supplied is intended for sale at home.
- Should nevertheless resale abroad follow (direct or indirect, with or without modification), the orderer will in such event have no claim to annual bonus or participation in special sales promotion programmes.
- For the resale of articles in non-EEC countries the deliverer will debit an additional surcharge of 10 % — calculated on the deliverer's asking price for the articles.
- The deliverer reserves the right in such event to assert further claims, in particular the right summarily to cancel the contract'.

- (11) On 12 August 1983 the Commission sent a Statement of Objections to Deere and the independent national dealers listed in paragraph 3 above. On 31 August 1983 Deere and again on 29 September lawyers representing Deere exercised its right to inspect the Commission's files, as did Cofabel on 7 September.
- (12) On 12 October 1983 Cofabel, Domi and Nagel and on 18 October Deere replied to the Statement of Objections without asking for an oral hearing.
- (13) On 21 March 1984, the Commission submitted to Deere the quotations from the documents in its file on which it might base its decision, some of which had been referred to specifically in the Statement of Objections and some of which were added in response to Deere's reply.
- (14) On 27 April 1984 Deere, through its lawyers, commented on these quotations. It has not produced any material invalidating the Commission's evidence or reversing the Commission's interpretation of it.

Deere and Company's distribution policies and system

Parallel trading — its causes and effects

- (15) Deere has allowed its various branches a certain independence in marketing policy. Some

Deere branches or national dealers, observing conditions in their national markets, have quoted lower prices or offered higher discounts than the branches or dealers in other Member States. In addition, currency fluctuations, in particular of the pound sterling, and policies of national governments have, from time to time, caused prices in different Member States to differ. This has led some farmers in higher-price States to seek to import from States where prices were lower and some dealers with lower prices to seek export business where prices were higher — in other words, it has tended to make parallel trading profitable. Deere's reaction to the problems thus caused was to attempt to inhibit parallel trading. There is evidence of its policies, of the effects of these policies, and of its reaction to these effects throughout the documents copied by the Commission's inspectors.

The formal agreements

- (16) Some of the forms of contract used by Deere or by its independent national dealers contained clauses forbidding exports — see, for example:
 - (1) Article 1 (e) of John Deere Export's Dealer Agreement (the standard contract made with national dealers), which read: 'The Goods purchased from the company shall be sold to the Dealer exclusively for agricultural use, and only for use in, or to purchasers residing in, the Dealers Area of Responsibility' (original English) — Nagel signed its contract in this standard form on the 3 October 1967;
 - (2) Articles 3 and 5 of Cofabel NV's standard distribution contract with Cofabel's local dealers — these read 'Article 3. The distributor undertakes to sell the Company's goods only to customers established in the area which is conceded to him Article 5. It is forbidden for the distributor to sell machinery to clients situated outside the area conceded to him. Any inquiry or order emanating from such a client should be transmitted to the Company. If the distributor, in spite of this, effects sales of goods in an area conceded to another distributor, the Company reserves the right not to execute the order or reduce by from 3 % to 7 % the distributor's discount for the machines. The Company will choose which independently. For its part, the Company reserves the right to effect sales anywhere

in Belgian territory whenever the distributor does not wish or is not able to sell because of special circumstances.' (original French and Dutch);

- (3) Article 12 of the former (1972 to 1977) general sales conditions annexed to the contracts with their local dealers by John Deere Vertrieb Deutschland — this read: 'The purchaser undertakes, as far as no contrary legal regulation prevents not to resell articles supplied abroad with or without modification either directly or indirectly. By breach of this undertaking he loses, without prejudice to any claim of the deliverer and with effect from the date of the order, his right to every rebate and any other benefit' (original German). Article 13 of the conditions valid from 1977 to 1982 is similarly worded.
- (4) Article 13 of the German conditions of sale the subject of the application for negative clearance (paragraph 10 above).
- (17) Other contracts do not contain such clauses (see John Deere SA's standard local dealers' contract) or even contain words such as '... but does not constitute any territorial restriction' (see John Deere Ltd's contract — original English). These contracts do contain clauses such as one limiting John Deere SA's undertaking to accept orders to '... the extent that these are in relation with the needs of the concessionaire's area of influence' (original French) or a statement that '... the Dealer's performance will be evaluated exclusively on the activity carried out in the described Area of Responsibility', or making access to Deere credit conditional on unspecified '... standards or requirements of uniform application ...' (original English).

The implementation of the agreements and other practices

- (18) Deere has treated contracts whether or not containing an export ban as if they did.
- (19) From 15 October 1975 Deere has sought, using the terms of the contracts or other means, to persuade or constrain its dealers not to export — in other words, it has sought to persuade the affected dealers to accept an export ban as a concerted practice.

- (20) Deere's local dealers with such contracts have understood exports to be forbidden. Deere has told dealers that, in the context of its overall distribution system, parallel trading was undesirable or unfriendly. Deere has refused or threatened to refuse to supply goods known to be intended for export. Deere, according to the Manager of John Deere Vertrieb Deutschland, has cancelled the contracts of dealers who export. Deere has sought to supply with specifications difficult to export. Deere has instructed its staff to demand prompter payment for goods known to have been exported and refuse quantity or special discounts or other aids to selling. Finally, Deere has charged 5 % on exports. In its German contracts this last is due only for non-EEC exports — however, the Manager of John Deere Vertrieb Deutschland has said that the 5 % is collected also for deliveries into EC-countries wherever '... possible in order to make this kind of business even more difficult for dealers.' (original English). There is evidence of all these facts in the documents quoted in the Statement of Objections and in the letter to Deere on 21 March 1984 (see paragraph 13 above). As was said in the Statement of Objections, many other documents could be cited dating from 1974 until October 1982.

Deere's knowledge of the illegality of its conduct

- (21) Deere and Company knew that such conduct, and, in particular, the contractual export ban, was contrary to EEC and national competition law. It was advised on this by its in-house counsel. Senior management of Deere and Company in Moline, including a member of the main board, was fully informed.

Effects of the agreements

- (22) All the national distributors mentioned in paragraph 3 above have been affected. All Member States except Italy, Ireland and Luxembourg are mentioned in the documents as being involved. These documents also comment on the substantial price differences being maintained between different Member States and on the effects of such differences.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (23) Article 85 (1) provides that all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention or distortion of competition within the common market shall be prohibited as incompatible with the common market.
- (24) Deere and the parties listed at paragraph 3 above, and their various local dealers, are undertakings within the meaning of Article 85 of the EEC Treaty, and the contracts between them are agreements within the meaning of that provision.
- (25) These agreements, and the concerted practices for their implementation, had among their objects the prevention of any trading in Deere products by any party other than Deere outside the Member State in which the party is situated. This has been clearly stated by Deere both in internal correspondence and in correspondence with its national distributors and its own local dealers. This has been understood and accepted by the national distributors and the local dealers, even though not always observed by them. This unlawful object is given effect to in some cases contractually and in others by a separate understanding backed by reprisals or threats of reprisals if the understanding is breached — contracts which do not contain explicit bans do contain clauses which make punitive measures possible (see paragraph 17).
- (26) Deere has argued that Deere staff claimed to have taken action when they had not, that instructions to penalize parallel trading were disobeyed and that its attempts to prevent parallel trading were ineffective. Instructions were, however, given with the object of preventing parallel trading, senior Deere staff did say that action had been taken and there were communications with dealers requesting them not to export and threatening various consequences if they did. The burden of proof is, therefore, on Deere to show that such instructions were never obeyed and such requests were always ignored in order to establish that they had no effect; and in the Commission's view, having regard to all the evidence, Deere has **not discharged** this burden. The Commission, therefore, concludes that these instructions and communications had effects.
- (27) Comment on the sales conditions applied in Germany from 1 November 1972 (paragraph 16 (3) above) is perhaps called for. The export ban contained in these sales conditions is qualified by the words '... as far as no contrary legal regulation prevents...'. However, the Commission holds that such an article constitutes an export ban in spite of this saving clause; the article is worded to read as if exporting is forbidden and imposed without explanation or negotiation by a company that ought to know the law on a multitude of small dealers; such dealers are less likely to know the law and unlikely, in the circumstances, to consult a lawyer; it is most unlikely, therefore, that the dealer would know that an export ban is contrary to Community law and could not in consequence of that fact be enforced against intra-Community exports. In other words, and in view of the fact that export bans are illegal within the common market, the drafting of this export ban constitutes a reversal of a general rule of Community law in respect of what should be only a derogation. Moreover, categorical interpretations of this clause by Deere to dealers, without any mention of the saving clause, are recorded. Deere's own in-house counsel expressed doubts as to the legitimacy of such a device.
- (28) Special mention should also be made of the Article 13 subject to Deere's application on 12 November 1982 for negative clearance (see paragraph 10). The object of this Article is to inhibit exports. The second indent provides a penalty for all exports. The third indent provides a penalty for exports outside the EEC; Deere staff say they apply this clause within the EEC when they can (see paragraph 20). The fourth indent contains the threat of a very severe penalty for exporting.
- (29) Thus Deere's contracts and conduct have, among other things, prohibited exports by its customers (and required national distributors

to prohibit exports by their local dealers). The Court of Justice said in the *Miller International Schallplatten GmbH* case, '... by its very nature a clause prohibiting exports constitutes a restriction on competition' (Case 19/77, Ground of Judgment 7, [1978] ECR 131). Deere has sought to prevent purchasers of Deere's products in the higher-priced Member States from benefiting from a unified market.

- (30) Deere's products have a significant part of the agricultural machinery market within the European Economic Community (see paragraph 6). Deere's own documents show that substantial differences in price for Deere products have existed between different Member States of the Community, that such differences have persisted and that, in consequence, there was persistent pressure for parallel trading (which Deere tried persistently, albeit often unsuccessfully, to prevent). Under these circumstances, the Commission is entitled to conclude that the restrictions in question are not of negligible effect, and have had a direct and actual influence on the pattern of trade between Member States.
- (31) Article 85 (1) of the Treaty does, therefore, apply to these agreements, including the sales conditions of the Article 13 treated at paragraph 27 above.

B. Article 85 (3)

- (32) Article 85 (1) of the Treaty may be declared inapplicable pursuant to Article 85 (3) in the case of agreements which contribute to the improvement of the production or distribution of goods while reserving to users a share in these benefits, provided they contain no restriction which is not indispensable to the achievement of the benefits and do not enable the parties to eliminate competition in respect of a substantial proportion of the goods concerned.
- (33) Deere has not notified any of these agreements, or any part of them, pursuant to Article 4 of Regulation 17, seeking application of Article 85 (3) of the Treaty, and, therefore, no decision in application of Article 85 (3) may be taken.
- (34) In any event, even had they been notified, the agreements could not have been declared exempt from the application of Article 85 (1) because the restriction of parallel trading does not appear to be indispensable to any

improvement of distribution to which a network of appointed dealers might give rise.

C. Article 15 (2) of Regulation No 17

- (35) Under Article 15 (2) of Regulation No 17, the Commission may impose fines of from 1 000 to 1 000 000 units of account or a sum in excess thereof, but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where, either intentionally or negligently, they infringe Article 85 (1) of the Treaty. In fixing the fine, regard shall be had both to the gravity and to the duration of the infringement.
- (36) Deere's infringement is very serious since it involves an export ban and, consequently, the prevention of competition between the dealers in Deere's products established in different Member States.
- (37) The infringement is of long duration. There has been a formal export ban since 1967. In fixing the fine the Commission has taken account of Deere's action in application of export bans since 1975 (see paragraphs 16, 19 and 20 above).
- (38) The application for negative clearance under Article 2 of Regulation No 17 of 12 November 1982 does not constitute a notification for the purpose of Article 15 (5) of that Regulation and, therefore, does not even protect from fines subsequent use of Article 13 of the German General Conditions of Sales, which was the subject of that application.
- (39) Deere acted intentionally. There was knowledge of the pressure for parallel trading, knowledge of its policy to prevent this trading and of the doubtful legality of many of the steps taken in order to prevent it throughout the Deere group within the Community (with the possible exception of John Deere Italiana) and among Deere and Company's top management in Moline, Illinois.
- (40) The Commission therefore considers that a fine should be imposed on Deere.
- (41) On the other hand, since receiving the Commission's Statement of Objections in August 1983, Deere and its national dealers have taken steps to remove export bans from their contracts, and Deere has begun to instruct its employees in Europe how to comply with the

Community's rules on competition. In addition, the agricultural machinery sector is depressed and Deere's profitability much reduced. The Commission has taken these into consideration in deciding on the amount of the fine.

- (42) Dealers which accept contracts containing export bans are also guilty of an infringement and, if the agreements are not notified, they also are liable for fines. However, the contractual export bans in this case are contained in preprinted standard contracts; clearly, therefore, the dealers had not taken the initiative to have the bans included in their contracts and had largely ignored them. Moreover, this is the first such case in the agricultural machinery sector. The Commission feels it appropriate, therefore, not to impose a fine on the dealers in this case.

D. Article 3 of Regulation 17

- (43) Under Article 3 (1) of Regulation No 17, the Commission may, if it finds that there has been an infringement of Article 85 of the Treaty, require by decision that the undertakings concerned bring such infringement to an end.
- (44) It appears necessary to require Deere and all its national distributors within the Community to remove all intra-Community territorial restrictions from their agreements and practice and to refrain from seeking to reimpose such restrictions by other means,

HAS ADOPTED THIS DECISION:

Article 1

The contracts entered into by Deere and Company with its national dealers within the common market, the various contracts containing export bans entered into by Deere and Company, its subsidiaries and national dealers with their local dealers, together with the practices with which contracts have been applied since 1975 so as to prohibit, discourage or penalize trading by dealers outside the Member State in which they are established constitute an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

Article 1 applies to Article 13 of the General Conditions of Sale of John Deere Vertrieb Deutschland, the subject of its application pursuant to Article 2 of Regulation No 17. Negative clearance for this Article 13 is not granted.

Article 3

The undertakings concerned must bring the infringement referred to in Article 1 to an end immediately and shall refrain from taking any measure having the same object or effect.

Article 4

1. The following fine is imposed on Deere and Company: 2 000 000 (two million) ECU, that is DM 4 465 720.

2. This sum shall be paid, within three months of the date of notification of this Decision, to the following account(s) in the name of the Commission of the European Communities:

- account No 260/00/64910,
- Banking institution(s) Sal. Oppenheim & Cie, Untersachsenhausen 4, 5000 Köln 1.

Article 5

This Decision is addressed to:

- Deere and Company,
John Deere Road,
Moline,
USA-Illinois 61265.
- NV Louis Nagel and Co.,
PO box 76,
NL-6500 AB Nijmegen.
- Dansk Oversøisk Motor Industri A/S (DOMI),
Sdr. Ringvej 35,
DK-2600 Glostrup.
- NV Cofabel,
Peperstraat 4A,
B-3071 Erps-Kwerps.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 14 December 1984.

For the Commission

Frans ANDRIESEN

Member of the Commission